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No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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As we explain in our petition for a writ of certiorari, this Court's review is needed to resolve conflicts among the courts of appeals on two important questions: First, whether the National Labor Relations Board (Board) has reasonably interpreted the term "independent judgment" in the definition of "supervisor" under Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11). And, second, whether the Board reasonably requires the party who alleges that an individual is a "supervisor" to bear the burden of proving the individual's supervisory status. With regard to the first of those questions, respondent

contends that there is no conflict among the courts of appeals. With regard to the second question, respondent does not dispute that there is a conflict, but contends that the question is not sufficiently important to warrant this Court's review. Both of respondent's contentions are incorrect.

1. As we have explained (Pet. 2, 13), an employee is a supervisor under Section 2(11), and thereby excluded from the rights and protections afforded by the Act, only if he has authority to engage in one of 12 specified supervisory functions and exercises that authority using "independent judgment." 29 U.S.C. 152(11). The Board has interpreted the term "independent judgment" to exclude ordinary professional or technical judgment that an employee exercises in directing less-skilled employees to deliver services in accordance with employer-specified standards. See Pet. 4, 13.

The courts of appeals are divided on the legal question whether the Board's interpretation of "independent judgment" is a reasonable construction of the Act entitled to judicial deference. See Pet. 19-21. In reviewing the Board's application of its interpretation in cases concerning the supervisory status of nurses, five courts of appeals have upheld the Board's interpretation, and four courts of appeals have rejected that interpretation. See *ibid.*; pp. 4-5, *infra* (discussing *Schnurmacher Nursing Home* v. *NLRB*, 214 F.3d 260 (2d Cir. 2000)). The conflict has been noted by the courts of appeals (and individual judges),[1] and the issue

[1] See *NLRB* v. *Attleboro Assocs., Ltd.*, 176 F.3d 154, 163 (3d Cir. 1999); *Beverly Enters., Va., Inc.* v. *NLRB*, 165 F.3d 290, 298-299 (4th Cir. 1999) (en banc); *Integrated Health Servs.* v. *NLRB*, 191 F.3d 703, 713 (6th Cir. 1999) (Jones, J., concurring); *Beverly Enters.*, 165 F.3d at 299 & n.1 (Phillips, J., dissenting).

has spawned dissenting opinions on both sides of the debate.[2] Indeed, courts on both sides of the issue have invoked the dissenting opinions of judges in other circuits in support of their respective positions.[3]

Respondent thus errs in contending (Br. in Opp. 1-6) that the disagreement among the courts of appeals reflects nothing more than differences in particular facts, such as "the type of nurses involved" and "the setting in which the nurses operate" (*id.* at 3), in each case. Rather, on essentially similar facts, some courts have rejected the Board's interpretation of "independent judgment" and therefore concluded that the nurses at issue are supervisors, yet other courts have accepted the Board's interpretation and concluded that the nurses involved are not supervisors.[4] As Judge

[2] See *Attleboro*, 176 F.3d at 170-172 (Bright, J., dissenting) (urging deference to Board's interpretation); *Beverly Enters.*, 165 F.3d at 299-303 (Phillips, J., dissenting) (same); *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 381-382 (6th Cir. 1998) (Moore, J., concurring in the judgment) (same); *NLRB* v. *Grancare, Inc.*, 170 F.3d 662, 668-670 (7th Cir. 1999) (en banc) (Kanne, J., dissenting) (urging rejection of Board's interpretation); *Providence Alaska Med. Ctr.* v. *NLRB*, 121 F.3d 548, 555-556 (9th Cir. 1997) (Noonan, J., dissenting) (same).

[3] See *Grancare*, 170 F.3d at 667 (deferring to Board's interpretation and expressing agreement with Judge Phillips' "persuasive" dissent in *Beverly Enters.*); *Attleboro*, 176 F.3d at 168 (rejecting Board's interpretation and expressing agreement with Judge Noonan's dissent in *Providence Alaska*).

[4] For example, in *Attleboro*, the Third Circuit rejected the Board's interpretation of "independent judgment" (176 F.3d at 166-168) and concluded that licensed practical nurses (LPNs) serving as "charge nurses" at a nursing home were supervisors because they "set[] daily assignments" and "direct[ed] the [aides] in their daily duties" (*id.* at 166). By contrast, in the Seventh Circuit's *Grancare* decision, the court upheld the Board's interpretation of "independent judgment" (170 F.3d at 666-668) and

Phillips has noted, "there is a sufficiently common pattern respecting [the nurses'] assignment, directive, and disciplinary activities that makes it obvious that the different results turn not on any significant factual differences, but on the way 'independent judgment' is construed and back of that, on the judicial deference owed the Board's construction." *Beverly Enters., Va., Inc.* v. *NLRB*, 165 F.3d 290, 299 n.1 (4th Cir. 1999) (en banc) (dissenting opinion).

Respondent is also mistaken in asserting (Br. in Opp. 2-3) that the Second Circuit's decision in *Schnurmacher*, *supra*, supports respondent's contention that "different factual scenarios account for the different holdings" (Br. in Opp. 2) among the courts of appeals. Rather, the decision in *Schnurmacher* confirms that the outcome in a particular case is governed by the interpretation of "independent judgment" applied by the court deciding the case. In *Schnurmacher*, the court of appeals concluded, contrary to the Board, that a nurse exercises "independent judgment" under Section 2(11) when she "makes a judgment as to the need for certain actions based on specialized knowledge and experience" and has responsibility "to see that others do what is required by that judgment." 214 F.3d at 268. The Second Circuit thereby rejected the Board's view that "independent judgment" does not encompass ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards, and its decision has deepened the conflict among the courts of appeals.

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concluded that LPN "charge nurses" at a nursing home were not supervisors even though they were "expected to 'take charge' by directing the [aides]" (*id.* at 664) and had "some assignment, scheduling, and disciplinary powers over [them]" (*id.* at 668).

Respondent is also incorrect in suggesting that the *Schnurmacher* court's statement that its decision was based "solely upon [the] factual record" and its disclaimer of the intent to "vest the title 'charge nurse' with any legal significance" (214 F.3d at 269 n.2) demonstrate that the discord among the courts of appeals results only from "different factual scenarios." Br. in Opp. 6. As we have explained, notwithstanding the disclaimer, the Second Circuit's conclusion that the nurses at issue were supervisors was based on its rejection of the Board's interpretation of "independent judgment." It is thus not surprising that courts that have accepted the Board's interpretation have, on similar facts, concluded that the nurses at issue were not supervisors. See, *e.g.*, *Grancare*, 170 F.3d at 664, 666-668 (discussed in note 4, *supra*).[5]

2. With regard to the conflict among the courts of appeals on the proper allocation of the burden of proving supervisory status, respondent mistakenly asserts (Br. in Opp. 7-8) that this Court's decision in *NLRB* v. *Health Care & Retirement Corp.* (*HCR*), 511 U.S. 571 (1994), demonstrates that the conflict is not "a matter of such importance that it requires review by this Court" (Br. in Opp. 7). Although respondent attempts to make

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[5] Respondent also mistakenly suggests that the decision in *Schnurmacher* turned merely on the facts of the case because the court of appeals, elsewhere in its opinion, upheld the Board's determination that the nurses did not exercise independent judgment insofar as "they assigned [aides] to patients and scheduled their break times" (Br. in Opp. 3). The court reached that conclusion not based on the Board's distinction between directions entailing the exercise of ordinary professional and technical judgment and those entailing the exercise of managerial judgment, but because the assignment and scheduling decisions were generally based on "prior practice." See 214 F.3d at 266.

much of the fact that the Court in *HCR* "made no mention" (*id.* at 8) of the burden-of-proof issue, the Court did not address that issue simply because the issue was not before the Court.[6]

As we have explained (Pet. 21-25), the Sixth Circuit's rule that the Board invariably bears the burden of proving that an individual is not a supervisor conflicts with the position of other courts of appeals on that question, which is both of general importance in the administration of the National Labor Relations Act and of decisive importance in this case. Accordingly, this Court's review of that question is warranted.

For the foregoing reasons, and the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] Although the Board had sought certiorari on the burden-of-proof issue in *HCR*, the Court's grant of certiorari was limited to the question of the validity of the Board's interpretation of Section 2(11)'s phrase "in the interest of the employer." See 511 U.S. at 576; see also 510 U.S. 810 (1993). The Board acknowledged in its petition for certiorari in *HCR* that the allocation of the burden of proof was not determinative of the outcome in that case, but the Board nonetheless urged review of the issue on the ground that the Sixth Circuit would adhere to its position in future cases. See Pet. 20 n.13, *HCR, supra* (No. 92-1964). As we have explained (Pet. 23-25), the burden-of-proof issue is of decisive importance in this case.